NO. 71-1033

In The Supreme Court of the United States.
October Term, 1971

Supreme Court, U.S.
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GREAT DANE TRAILERS, INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The Supreme Court of the United States

October Term, 1971

No.

GREAT DANE TRAILERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Great Dane Trailers, Inc., through its undersigned counsel, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit Court, entered in this cause on September 9, 1971, rehearing denied on November 19, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra* p. 2a) is reported at — F.2d —, 78 LRRM 2384. The Decision and Order of the National Labor Relations Board (J.A. 51-53)[1] is reported at 186 NLRB No. 43.

JURISDICTION

The Decision of the Court of Appeals was rendered on September 9, 1971 and a Petition for Rehearing was denied

[1] References to the Joint Appendix, filed with the Court of Appeals, will be through use of the symbol "J.A.", followed by the appropriate page number.

on November 19, 1971. On September 21, 1971, prior to receipt of the Petition for Rehearing, the Court of Appeals entered a Decree enforcing the Order of the National Labor Relations Board (App. A, *infra* p. 1a). The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, consistent with the requirements of due process, there may be an administrative adjudication of property rights on the basis of findings which vary materially from the allegations of the complaint, or other instrument by which such administrative adjudication was initiated, where there has been no subsequent amendment of such complaint and no finding by the agency that the dissimilar matters in question were ever actually litigated.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional provision is the Fifth Amendment to the Constitution of the United States. Applicable statutes are the National Labor Relations Act, as amended, (29 U.S.C. § 151, *et seq*) and the Administrative Procedure Act (5 U.S.C. § 551, *et seq*), relevant portions of which are set forth in Appendix B, *infra*, p. 3a.

STATEMENT OF THE CASE

Following an investigation of unfair labor practice charges filed by the union[2], the Board's Regional Director for the Tenth Region issued a Complaint against Great Dane Trailers, Inc., ("Company") in which it was alleged, *inter alia*, that the Company had discriminatorily discharged five employees, in violation of Section 8(a)(3) of the

[2] Truck Drivers and Helpers Local Union No. 728. ("Union")

National Labor Relations Act. (J.A. 3-4). The Company's Answer, while admitting certain allegations, denied the discharge allegations in their entirety (J.A. 6).

With the issues thus joined, a hearing was held before a Board Trial Examiner. Thereafter the Trial Examiner issued an Intermediate Report, in which he concluded, *inter alia*, that two employees, Vangiller and Hodge, had been discriminated against in violation of Section 8(a)(3) of the Act (J.A. 28-29; 14). With respect to Vangiller, while the complaint alleged he had been discharged, the Company denied that such was the case and contended, both in the course of the hearing and in post hearing briefs to the Trial Examiner and the Board, that Vangiller had voluntarily quit his job. At the hearing it sought to demonstrate this through testimony from Vangiller's immediate supervisor (J.A. 148), his department head (J.A. 138), the Director of Industrial Relations (J.A. 203-204) as well as through cross examination of Vangiller himself (J.A. 166-167). Consistent with the Company's contentions in this regard, the Trial Examiner concluded "there is no question that he in fact resigned." (J.A. 26). Nonetheless it was concluded that Vangiller had been discriminated against on a different theory, not alleged in the Complaint, that the Company had wrongfully refused "to consider a withdrawal of the resignation." (J.A. 28). The Complaint was never amended to allege this as an act of discrimination and the theory was first advanced in post hearing briefs to the Trial Examiner.

In the case of the other employee (Hodge), the Company sought to show that he had been discharged for cause. It also introduced evidence to show that, in the course of preparation for this hearing, it came to the Company's attention that Hodge had concealed a long criminal record

when he applied for employment. On the basis of this, the Company argued that, in keeping with Board precedent in similar situations, the usual remedy of reinstatement with back pay should be withheld, even if discrimination were found. The Trial Examiner simply concluded that Hodge had been discriminatorily discharged and recommended the usual reinstatement remedy, without comment on the alternative contention that it should be withheld in any event (J.A. 13-14).

The National Labor Relations Board subsequently issued its Decision and Order in this matter, in which it adopted the previously described findings and conclusions of the Trial Examiner.

The Company then petitioned the United States Court of Appeals for the Fourth Circuit to review and set aside the Decision and Order of the Board. After the Petition for Review was filed, the Board, by motion filed in the Fourth Circuit proceedings, indicated it was reconsidering a portion of its Decision and requested an opportunity to retain jurisdiction of the cause, in the event it should decide to modify its Decision and Order. The Court of Appeals granted this request and the Board later issued an "Order Amending Decision and Order", in which the contention, regarding Hodge's entitlement to reinstatement, was mentioned for the first time by either the Board or Trial Examiner. While acknowledging that the point had been raised, the Board nonetheless declined to pass upon it for the stated reason that it did not feel the issue was "fully and fairly litigated at the hearing."[2]

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[2] Neither the Board's General Counsel nor the union ever contended this issue had not been fully or fairly litigated.

At no point has the Board mentioned the variance between the allegation that Vangiller was discharged and the theory upon which the Trial Examiner, with Board acquiesence, ultimately found discrimination. Specifically there was no attempt to justify the variance, either on the theory that the alternative ground had been fully and fairly litigated (the approach taken in the Hodge case) or otherwise.

The Court of Appeals denied the Petition for Review and granted the Board's Cross Application for Enforcement of its Order. (App. A, *infra*, p. 1a). The Company's Petition for Rehearing, addressed solely to the due process issue raised herein, was subsequently denied.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit's holding is in conflict with the decision of the Sixth Circuit Court of Appeals in *N.L.R.B.* v. *Johnson*, 322 F.2d 216 (6th Cir. 1963), cert. denied 376 U.S. 951, 11 L.Ed.2d 971 (1964) on the important question of whether the Board may find a violation on some theory other than that which is advanced by its own Complaint against what it deems to be an offending party. In a broader sense the issue concerns the role of the complaint, or other means by which administrative action is initiated, as establishing a standard of relevance for the hearing required by the National Labor Relations Act or any other enactment, whether it be a hearing to be conducted in accordance with the provisions of the Administrative Procedure Act, or in instances where administrative adjudication is not controlled by the Procedure Act, but where the fundamental requirements of due process, such as adequate notice and opportunity to be heard, must be fulfilled.

The factual situation in the *Johnson* case is, in all material respects, comparable to that in question here. In that case, the Board's complaint alleged, as an act of unlawful discrimination, the failure to reinstate certain striking employees. This, according to the Sixth Circuit, presented a clear theory of allegedly unlawful conduct. Yet the Board, in what might be termed the converse of the situation presented here, made a finding that the employees in question had been discriminatorily discharged. The Sixth Circuit concluded that the Board's complaint "tends to point away from contemplation of any theory of discriminatory discharge" and the Board was therefore not justified in making a finding on that theory. The Sixth Circuit reasoned that:

> "[T]here is no reference to discriminatory discharge concerning the failure to reinstate or as a violation in itself. Discriminatory discharge is a violation of Section 8(a)(3) and failure to reinstate on request following a discriminatory discharge is yet another violation . . . (322 F.2d at p. 219).

The reasoning applies with equal force here. An allegation of discharge points away from any theory of discriminatory refusal to permit withdrawal of a resignation, no less than it points away from a theory of refusal to rehire or reinstate.

Similar views as to the office of the Complaint have been expressed in other circuits. *N.L.R.B.* v. *Dennison Mfg. Co.*, 419 F.2d 1080 (1st Cir. 1969); *N.L.R.B.* v. *H. E. Fletcher Co.*, 298 F.2d 594 (1st Cir. 1962); *N.L.R.B.* v. *Majestic Weaving Co.*, 355 F.2d 854 (2nd Cir. 1966); *Engineers & Fabricators, Inc.* v. *N.L.R.B.*, 376 F.2d 482 (5th Cir. 1967); *N.L.R.B.* v. *Fulton Bag and Cotton Mills,*

175 F.2d 675 (5th Cir. 1949); *Texas Industries, Inc.* v. *N.L.R.B.*, 336 F.2d 128 (5th Cir. 1964), *Boyle's Famous Corned Beef Co.* v. *N.L.R.B.*, 400 F.2d 154 (8th Cir. 1968). See also *S. S. Kresge Co.* v. *N.L.R.B.*, 416 F.2d 1225 (6th Cir. 1969), which reiterates the rule, explicated in the *Johnson* case, that "an essential element of due process (is) that an interested party must be given notice and an opportunity to prepare a defense *prior to* an adjudicative proceeding." (emphasis supplied).

2. The holding of the Fourth Circuit is in conflict with Section 554 of the Administrative Procedure Act and the decisions of other Circuits construing that Section of the Act. Section 554 requires that parties to an administrative proceeding be given "prompt notice of issues controverted in fact or law." This has been construed to mean that there must be a full and fair hearing, "conducted in accordance with fundamental principles of fair play" and unless there is fair notice of the claims of the opposing party and an opportunity to meet those claims, the requirements of due process have not been met. *Russell-Newman Mfg. Co., Inc.* v. *N.L.R.B.*, 370 F.2d 980 (5th Cir. 1966), citing and relying upon the holding of this Court in *Morgan* v. *United States*, 304 U.S. 1, 82 L.Ed. 1129 (1938). Similarly, learning of such claims after the hearing does not, and cannot, constitute "fair notice." *N.L.R.B.*, v. *Tennsco Corporation*, 339 F.2d 396 (6th Cir. 1964).

3. The question of what constitutes adequate notice and the related question of the role of the complaint, or comparable instrument, as establishing a standard of relevance which shall govern the subsequent hearing procedures, are matters which, in light of increasing resort to administrative adjudicative procedures, have implications

which go far beyond the immediate factual situation and should be weighed and passed upon by this Court.

Whether a hearing is required by statute or by reason of the due process clause of the Fifth Amendment, there exist the same fundamental requirements as to notice of, and opportunity to meet, whatever opposing contentions are involved. *Yang Sung* v. *McGrath*, 339 U.S. 33, 94 L.Ed. 616 (1950). In light of the "vast and varied administrative" tribunals "and the equally numerous and diversified interests affected by their functioning," the questions presented are of significant constitutional import and effect. *Federal Communications Commission* v. *Station WJR*, 377 U.S. 265, 93 L.Ed. 1353 (1949). The need for guidance from this Court, in the form of specific pronouncement upon the necessary relationship between the original contentions and ultimate findings, is further pointed up by the already accepted fact that the administrative bodies are not bound by strict rules as to admissibility of evidence which prevail in conventional judicial proceedings. The Court has recognized that "the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended." *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U.S. 88, 57 L.Ed. 431 (1913). More specifically the assertions must be and remain such that the "parties[will] be fully apprised of the evidence submitted *or to be considered*," in arriving at the ultimate findings or conclusions. *(Ibid.)* (emphasis added). The Court has passed upon the propriety of altering or amending the initial assertions at the outset of a hearing, while the hearing is in progress, and even at its conclusion when no material change was intended. *Consolidated Edison Company* v. *N.L.R.B.*, 305 U.S. 197, 83 L.Ed. 126 (1938); *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333,

82 L.Ed. 1381. But these cases left open the important question of whether, and to what extent, the complaint shall set a standard of relevance which will govern the nature and extent of the findings ultimately made. This is particularly significant in the context of National Labor Relations Board proceedings because Congress did not undertake to enumerate specific acts or conduct which shall constitute an unfair labor practice. Rather, it delegated to the Board "the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 798, 89 L.Ed. 1372 (1945). It is the very fact of these "infinite combinations" which makes it essential that the Board, which on the basis of its preliminary investigation of charges is in a position to know and say, be required to adhere to the contentions raised before and during the hearing, and not enjoy the element of surprise which results from advancement of a dissimilar contention in its post hearing brief. Such an advantage is not tolerated in conventional judicial proceedings and, though not such a proceeding in the strict sense, the administrative hearing required by due process is in the "tradition of judicial proceedings." *Morgan* v. *United States*, 298 U.S. 468, 480, 80 L.Ed. 1288, 1294 (1936); *Shields* v. *Utah Idaho Central Railroad Company*, 305 U.S. 177, 83 L.Ed. 111 (1938). And "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." This includes the right to know the specific charges into which inquiry is to be made. *Hannah* v. *Larche*, 363 U.S. 420, 4 L.Ed. 2d 1307 (1960). In the absence of an appropriate amendment of those charges, reliance upon matters beyond their scope

is viewed as an infringement upon procedural rights. *Vitarelli* v. *Seaton*, 359 U.S. 535, 3 L.Ed. 2d 1012 (1959).

4. The decision below conflicts in principle with the decisions of this Court in *Florida* v. *United States*, 282 U.S. 194, 75 L.Ed. 291 (1931); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 294 U.S. 499, 79 L.Ed. 1023 (1935); *N.L.R.B.* v. *Virginia Electric & Power Company*, 314 U.S. 469, 86 L.Ed. 348 (1941); *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 85 L.Ed. 1271 (1941); *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 91 L.Ed. 1995 (1947); *Federal Power Commission* v. *United Gas Pipe Line Company*, 393 U.S. 71, 21 L.Ed. 2d 55 (1968). These cases establish and reaffirm the rule that the basis for administrative action must be set forth with sufficient clarity to enable a reviewing court to determine if the agency has acted within the scope of the authority entrusted to it. This includes an adequate explication of the theory underlying agency action, an expression of its reasons "with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order." *Securities and Exchange Commission* v. *Chenery Corp.*, *supra*. A finding (such as the finding of discrimination in this case) based upon a theory which is at variance with that announced in the complaint, without explanation of the reasons for such variance, contravenes this long established principle. In contrast, the Board gave due consideration to this principle when it provided an explanation for not disposing of the contention as to reinstatement in the other (Hodge) case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

O. R. T. Bowden

Robert C. Langquist

Counsel for Petitioner

APPENDIX A

[Caption Omitted]

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

THIS CAUSE came on to be heard upon the petition of Great Dane Trailers, Inc., for review of an order issued against it by the National Labor Relations Board on October 21, 1970, in proceedings before the said Board known upon its record as Case No. 10-CA-8095; upon the cross application for enforcement, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition of Great Dane Trailers, Inc., be, and it is hereby denied; and that the said order of the National Labor Relations Board be, and it is hereby, enforced; and that Great Dane Trailers, Inc., abide by and perform the directions of the Board in said order contained.

_____

Clerk

FILED
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SAMUEL W. PHILLIPS
CLERK

APPENDIX A

[Caption Omitted]

(Argued August 27, 1971 Decided September 9, 1971.)

BEFORE SOBELOFF, SENIOR CIRCUIT JUDGE, AND WINTER AND RUSSELL, CIRCUIT JUDGES.

Robert C. Lanquist (Hamilton and Bowden on brief) for Petitioner, and Frank Vogel, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Elliott Moore, Attorney, National Labor Relations Board, on brief) for Respondent. (Robert L. Mitchell on brief) For Invervenor.

PER CURIAM:

There was substantial evidence to support the Board's findings and its conclusion that §§ 8(a)(3) and (1) were violated. We find that none of the company's procedural due process rights were violated in the conduct of the proceedings. The company's motion that the proceedings should be reopened for the receipt of after acquired evidence is lacking in merit.

ENFORCEMENT GRANTED.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD.

The relevant provisions of the National Labor Relations Act, as amended, (29 U.S.C. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

* * *

The relevant portions of the Administrative Procedure Act (5 U.S.C. § 551, *et seq.*) are as follows:

Sec. 554. Persons entitled to notice of an agency hearing shall be timely informed of —

* * *

(3) the matters of fact and law asserted.